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THE SOLE AND SEPARATE USE IN PENNSYLVANIA.

That it is a commendable purpose on the part of a father or mother to so settle the estate destined for a daughter who is married, that she cannot, under the inducements of the husband, dispose of it, a considerable number of the decisions of our highest court concede. A married woman may be persuaded or coerced by her husband and she may unwisely or weakly yield to this persuasion or coercion. Therefore let us make this impossible when the benefactor wants to make it impossible, virtually say the courts, by establishing the principle that property, real or personal, given to the sole and separate use of a married woman, shall be inalienable.

But how long inalienable? Only so long,—the answer is, and it seems sensible,—as the danger of marital influence, which the attempt is to thwart, lasts. It would follow, apparently, that, if an estate were given to a daughter for her sole and separate use and she were not married until some later time, the trust and the inalienability would be suspended, until marriage, but would operate upon marriage, and if the coverture terminated by the death of the husband or by a divorce, the trust and the inalienability would be again suspended, until a second coverture should make it again operative.

If it is proper to allow a parent to protect his daughter from the undue influence of one husband, why not of two? If the one husband lives 40 years, the injury to the public from tying up the estate would be as great, surely, as if he had died in 20 years, and another husband were then taken, the coverture under whom lasted 20 years more. Are the courts so averse to second marriages of wid-

ows that for this reason they will refuse to them the protection of this principle of non-inalienability? Or do they think that fathers and mothers, in settling property on their daughters, cannot and therefore do not, desire and intend that their daughter's property shall be safeguarded, if they are so unwise as to take a second husband? Assuming that the law is made by practical men for practical persons, it is really difficult to see why protection may not be extended against successive husbands, as wisely as against one.

A man has a daughter who is not married when he writes his will, and dies. She may be young and then unmarriageable, or she may be old enough to marry and may have a more or less vague intention to marry. But the courts, sovereignly legislative, have ordained that no possible safeguard against a future husband's malign influence over her, may be adopted by her father. If she were only married but a day; nay, if she were only engaged to be married to a man of whom he knew nothing, whom probably, he had never seen, he could make her estate inalienable. But since she is not, but is only going to become married, she must, in taking the husband, take all the risks attendant upon his masculine ascendancy. Can anything be said in defence of such a position? It will hardly be suggested that no sole and separate use should be created, unless the settlor or testator knows the personal and business qualities of the husband. These he often cannot know. They are developed with time and circumstance.

Why should the older or otherwise more fortunate daughters who already have husbands, be protectable by the aegis of inalienability, and the unmarried daughters not? In order to preserve their property from the influences from which their older sisters' is preserved, they must abstain from marriage altogether.

Perhaps the answer is, not so! The father may make a spendthrift trust for an unmarried daughter. He may so settle his estate that only the income of it can be paid to her, and that payment to her own hands will alone discharge the trustee? But this trust is as available for a married as for an unmarried daughter. Why should the father have the selection of either of two, or of both, for the former, and only of one for the latter?

It has not yet been decided that a spendthrift trust, to operate only during coverture, not to operate until, nor after coverture, would be valid. It would almost certainly be decided invalid. The parent of the daughter who is unmarried, must therefore contemplate either that she shall abstain from marriage, or suffer the risk of loss of her property from martial influence, or he must deprive her of power over her estate when she is discovert, a discrimination between daughters for which there is not the slightest justification, on his part, or

on the part of those who make the law; and which could have been avoided by recognizing, as courts in other jurisdictions do, the validity of sole and separate uses, for any actual period of coverture, although it may be preceded by a period of singleness.

But, oddest position of all, is that which is found in Neale's Appeal,[1] and in Quin's Estate,[2] viz. that though the daughter is in fact married when the estate passes to her or to a trustee for her, nevertheless, if when the will was written, she was not covert the sole and separate use created by it shall be utterly void. A dying man, whose daughter is then unmarried, cannot protect the property he is giving her from a husband whom she may and probably will take, and on the other hand, a father who is not about to die, but who wants to provide for the contingency of death, cannot effectively create a sole and separate use for a daughter who is unmarried when the will is written, although she becomes covert before it takes effect. In Neale's Appeal, the child was nine years old when the will was written in 1871. She married in her 17th year, that is in 1879. Her father, the testator, died Nov. 27th, 1880. In Quin's Estate, the will was executed May 27th 1872. The daughter was married in 1875. The testator died Sept. 6th, 1886. In both cases, the gift to the daughter was to her sole and separate use; in both the daughter was married when the will began to operate; in both the execution of the will preceded the marriage; in both the use was declared void. Why?

The objection to sole and separate uses is that they take from the owner of land, during a portion of the period of ownership, the customary and desirable incident of ownership, viz, the power of alienation. Despite its impolicy, the withdrawing of this power from the owner is justified, because of the greater impolicy of making it impossible to exempt a wife's property from the effect of the sinister influence of a husband. But, in the cases referred to, there never was a time, while the property was the daughters', when they were not covert. The mischief of conferring an estate, and at the same time withholding the power to alienate it, except during coverture did not exist. When the estates passed to the daughters affected by the anti husband trust there were in fact husbands. How then is the denunciation of the trust justified, simply because when the wills were written, there were no husbands? Mercur C. J., in defence of it cites authorities to the effect that a separate use "cannot be created unless she is covert." But when is a use "created"? Surely not until the estate on which it operates is created. And when is that created? Does the writing of a will, which simply expresses a present intention to pass an estate at death create or pass that estate? The intention that at some future

[1] 104 Pa. 214.
[2] 144 Pa. 444.

time, at the intender's death, an estate shall come into existence is surely not the "creation" of that estate. The estate, if it ever shall be created, will be created (a) by the present will, (b) by future abstinence from making some other disposition either by will or by revocation or by disposal of the property while alive, (c) by the testator's death, and (d) by the survival of the devisee. The process of "creation" is not completed except by death.

In Quin's Estate, it is true, Clark J. repeating the doctrine of Mercur J. that the marriage must be in existence "at the creation of the trust" adds "and, although the trust does not take effect until the testator's death, it is very plain that it is created and exists under and by virtue of the will." A palpable evasion. It is created under, it does exist by virtue of the will. Who could contest this? But is it "created" when, as soon as, the will is written? Are not other things besides the will, necessary to its creation? *e.g.*, the survival of the devisee? The death of the devisor? The continuance of the same testamentary intention between the writing of the will and the death? In Quin's Estate, the will was written 14 years before the writer's death. Did the daughter's estate exist during those years? If not, something else had to occur to bring it into existence; to "create" it.

But why entangle ourselves in a word? Is there any sensible policy of law that forbids the "creation" of a sole and separate use before the marriage of the *feme*, if no estate actually vests in that *feme* until she is married, and if, therefore, there is no actual divorce between having an estate, and having a power to alienate it, except during and on account of coverture?

Clark J. invokes another principle. If a man is insane when he writes a will, the will does not become valid by his subsequent recovery of sanity. If when the will is written, the law requires a will to be executed in a certain way, to which law, its execution does not conform, a subsequent change in the law whereby a will executed as this was, would be valid, does not retroact upon this and make it valid. With the best intentions, it is really difficult to realize the force of this reasoning. The will before the court was not defective by reason of subjective incapacity of the writer; nor because the testamentary intention was not expressed in the legal mode, but if at all, because the estate, intended to come into existence, was intended to have certain qualities, which it might lawfully have, if a new fact should when it came into existence, have occurred, viz, marriage, but which it could not lawfully have, unless this new fact had come into existence. The testator was not attempting to create a sole and separate use for an unmarried person, but a sole and separate use, in case, at the going into operation of the estate, the devisee should be

a married person. It would be a palpable *petitio principii* to argue that it is illegal to provide,in advance of death, by will, for an estate which, if the devisee shall then be covert, shall be affected with inalienability, and therefore that this will is illegal. The very question is, does the law forbid the arranging by will for an estate which, if the intended devisee shall become covert, shall be charged with a sole and separate use. If it does, then, of course, the separate use in Quin's Estate was void. But, it will never do to attempt to prove that the law does forbid such an arrangement by means of the assertion that the law forbids such an arrangement. It is hardly short of absurd to say, that because the law makes void a sole and separate use, attached to an estate when there is no coverture, therefore it makes void a testamentary provision for an estate with a sole and separate use, when there shall be a coverture, if the coverture does not already exist when the will is written.

When a statute says a will must be executed thus and thus, a subsequent change or repeal of the statute does not affect wills theretofore made which, in their mode of execution, did not conform to the then existing law, but, would have conformed to the later law When the law requires a will to be the expression of a sane intention, an insane man's will does not become the expression of a sane intention, by reason of his later becoming sane. But when a man writes that at his death, he wants his daughter, if then covert,to hold her devise free from marital control, he offends no rule that had been propounded in Pennsylvania prior to Neale's Appeal.

Is it suggested that the testator did not in that case and in Quin's Estate, provide for a sole and separate use, on condition that the daughter should be married when the will went into effect? The answer is, that the condition may be easily and sensibly implied. If he knew the law, he must have meant it, and we are assured in Quin's Estate that he must be presumed to have known the law. If he knew that a sole and separate use is a use against a husband, he knew that the condition of its becoming operative, was that there should be a husband. He knew that there was, as yet, no husband. Of course he created the use for a future marriage, and if that marriage occurred before his own death, so that there was no time during which the estate was in the daughter, while she was discovert, why should the testamentary arrangement be declared void in deference to a schoolman's logic, playing on phrases?,

In Neale's Appeal, the testator bequeathed property to his daughter and his granddaughter, "for their sole and separate use and which shall not be controlled etc by * * * any future husband of my said granddaughter." The language of the will in Quin's Estate is "And, in case of the marriage of my said daughter Mary, then * * * the

same (income) shall not in any wise be subject to the control of their respective husbands" (i e.) of the two daughters. The provision is expressly conditioned on a future marriage.

The doctrine of the cases then is, that if a testator devises anything to a daughter, unmarried when the will is executed, and provides that she shall if she gets married, hold it subject to a sole and separate use, the provision of the use is utterly void, and for this doctrine, not a shred of tolerable reasoning is tendered.

Clarke J., in Quin's Estate, apologetically remarks, "If it is believed that the law should be otherwise, the appeal should be to the legislature. The rules prevailing in this state in reference to sepaate uses have become rules of property." But who made them? The power that made viz, the court, can unmake them. The "rule" specially referred to was made in 1883, and it annulled the will of a testator. Only eight years elapsed, before Clark J. dignified it with the name of a "rule of property," that is, one decision, poorly considered, and feebly defended by reasons, makes a rule of property, which, eight years after, when the next case, presenting the same question arises, has become so far inviolable, that the courts can furnish no escape from it! There have been other rules of property consecrated by longer recognitions, which the courts of Pennsylvania have found a way to overthrow[1]. If in 1891 they had lost the art of destroying a pernicious and indefensible rule, only eight years old, of their own invention, it is devoutly to be hoped that they have since recovered it.

We have not adverted to the Act of June 4th, 1879, which enacts that "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." In Neale's Appeal the will was written eight years before the passage of this act. It is intimated however, that even if applicable to the will, the act refers simply to the property intended by the testator to pass, and not to the estate therein. It was not the intention of the act, says Mercur, C. J., to create a disposing power, just before the testator's death, which he did not possess, when he wrote it. At common law, a man could not dispose of that which he had not, and, therefore he could not dispose by will, of that which he did not acquire until subsequent-

[1] Cf. MacConnell v. Lindsay, 131 Pa. 476 MacConnell v. Wright 150 Pa. 275. In 1855 it was decided that land held to the sole and separate use was alienable. Haines v. Ellis, 24 Pa. 253 and in 1863 the contrary was decided; Wright v. Brown, 44 Pa. 224. What became of the rule of property?

ly[1]. The act of 1879 was intended either to give him a power to dispose at the making of the will of that which he previously could not dispose of, or to compel the courts to treat the will, considered as a disposition of property, as a disposition made at death. It would not be doing violence to this act to regard it, as it makes a disposition of property of which the testator could not dispose at its writing, valid if he could have disposed of it at death; as also making modes of disposition of this property valid that would not have been so at the writing; if they would have been valid if made at the death. But if this interpretation is too liberal and the act of 1879 has no effect upon the question we have been discussing, enough has been said to suggest the need of a retraction of the preposterous doctrine of the cases criticized. PRAETOR.

MOOT COURT

XENIA BANK vs. WM. ABSALOM.

Negotiable Instrument Act of May 16, 1901, Sections 139-140 Construed—Qualified Acceptance.

STATEMENT OF THE CASE.

Absalom drew a draft on Bolton addressed to him at Philadelphia to the order of Cox for $5000. Cox took the draft to Bolton who wrote across the face "accepted payable at the Chemical National Bank, New York." Cox then had the draft discounted by the Xenia Bank and the proceeds thereof credited to his account. At its maturity, the draft was duly protested for non-payment and the notice of protest duly served on Absalom and Cox. The Xenia Bank brings an action of assumpsit on the draft against Absalom.

Johnson for the plaintiff

The drawer remains at all times the principal debtor on the bill. Norton on Bills and Notes, p. 79. The holder or owner of a negotiable note does not discharge the drawer. White v. Honkins, 3 W. & S. 99; Swope v. Ross, 4 Pa. 186; Walker vs. Bank, 2 S. & R. 3 8 2.

Davies for the defendant.

An undertaking by the drawee of a bill to pay it at a different town from that at which the bill is addressed to him constitutes a qualified acceptance. Walker v. Bank, 13 Barb. 663; Niagara Dist. Bank v. Fairman &c Co., 31 Barb. 403.

An acceptance varying from the tenor of the instrument as to time, amount, mode or place of payment is a qualified acceptance.

Am. & Eng. Ency. Vol. 4, p. 224; Norton on Bills & Notes, p. 82.

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[1] See Girard v. Philadelphia, 2 Wall. Jr. 305, quoted in Quin's Estate 144 Pa. 444. "A will is in the nature of a convevance or an appointment of a particular estate; and consequently, *the testator must have the power to dispose at the time the will is executed.*

OPINION OF THE COURT.

LAUB, J.:—The question in this case seems to be whether the words "accepted, payable at the Chemical National Bank, N. Y." constitute such a general acceptance, under the Act of May 16, 1901, P. L. 203, that the plaintiff bank can maintain this action against the drawer, Absalom. If this be a qualified acceptance, then under section 142, of the Act of May 16, 1901, P. L. 213, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. Were it not for the words of the said act of May 16, 1901, we should have no hesitation in saying that the acceptance was qualified, since an acceptance varying from the tenor of the instrument as to time, is generally called a qualified acceptance: Am. & Eng Encyclopedia of Law, vol. 13, 595. There are cases taking the position that an undertaking by the drawee of a bill to pay it at a different town from that at which the bill is addressed to him, constitutes a qualified acceptance: Walker v. State Bank, 13 Barb. (N. Y.) 636; Niagara District Bank v. Fairman, 31 Barb. (N. Y.) 403. Myers v. Standart, 11 Ohio State 39 In Bridge v Livingston, 11 Ia. 57, it was held that a qualified or conditional acceptance must have the assent of all the antecedent parties—the drawer and the indorsers—in order to be binding upon them, and in the absence of such assent they are released from liability on their undertaking. A purchaser or holder must also know, at his peril, what is necessary to constitute an acceptance or an indorsement; Mercantile National Bank v. Lauth, 143 Pa. 62.

It is true that Bolton by accepting the draft in the manner he did made it a foreign bill. For if the drawer and drawee of a bill reside in Pennsylvania, and the bill is payable in New York it is foreign: Pierce v. Struthers, 27 Pa. 247.

In spite of the authorities above cited we do not think that the words "accepted, payable at the Chemical Bank, N. Y.," constitute a qualified acceptance under the act of May 16, 1901, P. L. 203. Let us now consider the sections of that act in reference to the matter of acceptance.

Section 139 of said act, P. L. 213 says, "An acceptance is either general or qualified. A general acceptance assents, without qualification, to the order of the drawer. A qualified acceptance in express terms, varies the effect of the bill as drawn." Were this section all that was said upon the subject of acceptance, we should unhesitatingly say that the acceptance in question is a qualified acceptance, as in express terms it varies the effect of the bill as drawn.

However, section 140 of said act, P. L. 213 says "An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere." Applying this section to the case in hand we find an acceptance to pay at a particular place, viz: the Chemical National Bank, N. Y.; but we do not find that the acceptance expressly states that the bill is to be paid only at the Chemical Bank, N. Y., and not elsewhere. Indeed Cox the payee did not get it discounted at the aforesaid bank but at the plaintiff bank, which probably was a Philadelphia bank.

The act divides quailified acceptance into five parts, the third of which, is "Local: that is to say, an acceptance to pay only at a particular place." Here again we find the word "only" used, thus making it seem to be necessary to constitute a qualified acceptance that the acceptance should have read "accepted, payable only at the Chemical National Bank, N. Y." We

think that the view of the acceptance taken in this case, viz.: that it is a general acceptance, accords with the intention of the legislature in passing the act of May 16, 1901, P. L. 203, which intention seems as far as possible to remove the clogs and impediments hindering the freedom of circulation of negotiable instruments. Since this is a general acceptance, the drawer Absalom is liable on the draft when not paid at maturity, and the plaintiff bank as a holder for value can maintain this action against him.

OPINION OF THE SUPREME COURT.

The draft was addressed to B "at Philadelphia." The acceptance by him was qualified by his undertaking to pay at the Chemical National Bank, N. Y.

In England such a change of place of payment would have discharged the drawer, unless on being promptly informed of it, he assented to it. It was held that the acceptor would not be liable, unless presentment was made at the place named by him. Rowe v. Young, 2 Brod. & Bing. 165, 1 Daniel, 513. The act of Parliment, known as Sergeant Onslow's act, provided that such an acceptance, i. e., one naming a place of payment other than that expressed or implied in the bill itself, should be deemed a general acceptance unless expressed to be payable there "only and not otherwise or elsewhere;" 1 Daniel, 515, 516, 613; The act was intended to affect the liability of the acceptor; i. e. to make him suable, notwithstanding that demand had not been made for payment, at the place named by him, unless ne had named that as the only place where it should be made. It did not affect the liability of a drawer or indorser. 1 Daniel, 613.

The drawer or indorser was dis-charged, if the holder, without his assent acquiescingly received an acceptance payable at some other town than that named in the bill. And this was the result in the American States, "Thus, says Daniel, 1 Vol. 513, "if the bill be addressed to the drawees at their place of residence, and it is accepted, payable at a different town, it is a material variation if the holder receives it, and does not protest for non-acceptance; but a bill addressed generally to the drawee, in a city, may be accepted, payable at a particular bank in the city." Troy City Bank v. Lauman, 19 N. Y. 477; Meyers v. Standart, 11 Oh. St. 29; Niagara Bank v. Fairman Co. 31, Barb 403.

It does not appear that the bill in this case was such that presentment of it for acceptance was necessary, in order to hold the drawer. Negot. Inst. Act Art. XII. Presentment of bills etc. But the presentment having been made, it was necessary for the holder to treat it as dishonored, and to give timely notice of the dishonor, to the drawer, if he desired to hold the latter. A qualified acceptance must be treated by the holder as no acceptance, as far as concerns the drawer, unless the latter assents to it on prompt notice. There was no such notice in this case. The only question before us, then, is whether the acceptance is to be regarded as qualified.

The authorities cited show that it was so regarded, prior to the enactment of the Negot. Inst. Law. That law declares that "An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere." This was evidently suggestetd by Sergeants Onslow's Act. The Negot. Inst. Act defines a der of the drawer," but then adds that "an acceptance to pay at a particu- general acceptance, as one which "assents without qualification to the or- lar place is a general acceptance" unless "etc. In brief it prevents a certain interpretation of the words of the acceptance. If the acceptance says

payable "only" at a certain place, it will be understood to be so payable, but if it says "payable at a certain place" it must be understood to mean that the acceptor, nevertheless agrees to pay at the place named in the bill. The added words have only the effect of indicating an alternative place.

It has been suggested that the Neg. Inst. Act. by a "particular place" means a definite place within the area of the town or city at which the bill is by its terms to be paid, and that it does not apply to a case in which a town or city is named by the acceptor, which is different from that named in the bill. On reflection, we have not been able to accept this view. We are not convinced that the acceptor's naming a particular spot in a city or town for payment, is not enough to make the spot named, the spot at which demand for payment would need to be made, in order to hold the drawer. The drawer would give an implied authority to the drawee to designate such a spot. But there is no implied authority, given to him to name a different place. The object of the Negot. Inst. Act seems to be to prevent the nomination of a different town or city from impairing the liability of the drawer, unless this town or city is made the sole place of payment.

Judgment affirmed.

BOLLINGER'S ESTATE.

Mortgage—Equity of Redemption—Merger—Preference of Execution Creditors.

STATEMENT OF THE CASE.

A holds a first mortgage on Bollinger's land, B and C hold judgments against Bollinger's land after the lien of the mortgage attached. Bollinger becomes very sick and A in order to save cost of foreclosure secures a deed from him and records the deed. A's mortgage remains unsatisfied. B and C issue executions, levy upon and advertise this land for public sale. A issues a sci. fa., obtains judgment, issues execution and sells the land. The proceeds are undergoing distribution. A and the judgment creditors claim in opposition to each other. The plaintiff is A.

Stuart for the plaintiff.

The entering of any judgment for some debt secured by a mortgage shall not cause a sheriff's sale of the mortgaged premises to destroy or in any way effect the lien of such mortgage, nor shall the plaintiff in such judgment be entitled to any part of the proceeds of such sale. P. & L. Dig. 1583; Com. v. Wilson, 34 Pa. 63; McCall v. Lenox, 9 S. & R. 304; Pierce v. Potter, 7 Watts, 475.

Lewis for the defendant.

Plaintiff has a right to issue sci. fa., have execution issued and can give good title to his purchaser. Moore v. Harrisburg Bank, 8 W. 138; Dougherty v. Jack, 5 W. 456; Pennington v. Coats, 6 Whart. 282.

OPINION OF THE COURT.

TOBIN, J.:—This is a short and simple case, addressing itself to the

common sense and common justice of the plainest man, and seems to require no legal learning to decide it. We now proceed to the great question on which the cause must depend. Does the union of the two interests in the mortgage cause a merger? In law a merger always takes place when a greater estate and a less coincide and meet in one and the same person, in one and the same right without any intermediate estate. The lesser is annihilated or merged at law in the greater. Furthermore, to effect a merger at law, the right previously held, and the right subsequently acquired must coalesce in the same person and in the same right without any other right intervening. But upon this subject says Sir William Grant in Forbes vs. Moffat, 18 Ves. 390 "a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law; and sometimes preserve it, where, at law it would be merged. It is also very clear that a person becoming entitled to an estate subject to a charge for his own benefit may if he chooses, at once take the estate and keep up the charge. The question in such a case, is upon the intention actual or presumed, of the person in whom the estates are united. In most instances it is with reference to the party himself, of no sort of use to have a charge on his own estate, and when that is the case it will be on foot." And in conformity to this doctrine, he held in that case that a mortgage was not merged or extinguished by becoming united in the same person with the fee, because it was to be presumed that such was the intention of the party from the greater advantage being against merger in favor of the personal representatives, it not appearing from the acts or declarations of the party what his actual intention was in regard to it. Moore vs. Harrisburg Bank, 8 Watts, 138; Helmbold vs. Mann, 4 Wharton, 409. But in the case under consideration there is no room nor occasion to presume what the intention of the parties was; because it was impliedly agreed and avowed that it should not sink but be kept on foot for the purpose of indemnifying the mortgagee against subsequent encumbrances existing against the estate, and to avoid the expenses of foreclosure by taking or accepting the deed conveying to him the fee in it. Hence this case does not rest on the mere presumption which would doubtless also be sufficient to prevent merger of the mortgage, but is much stronger against it than the case of Forbes vs. Moffat, supra. It was said with much emphasis in Moore vs. Harrisburg Bank, supra, by Justice Kennedy that, "a mortgage does not necessarily merge or become extinct by being united in the same person with the fee; it may be kept alive where such is the intention of the holder or the intention or agreement of the parties or where it would be for the holder's interest or advantage that the lien should be preserved; in the latter case his intention to keep the mortgage alive will be presumed; merger being largely a question of intention, where there is the intention, actual or presumed of the person in whom the mortgage and fee unite that there shall be a merger, equity will not hold the mortgage extinguished." We believe this to be the law as established by the courts of Pennsylvania. To hold otherwise would result in wrong and injustice or obscurity and confusion.

Therefore, when it was the intention of the parties that the mortgage should not merge but continue to subsist for the protection of the owner of the fee from subsequent incumbrances he may keep it on foot, sue out a scire facias upon it in the name of the mortgagee against the mortgagor, with notice to himself, obtain a judgment and sell the estate mortgaged. 12 P. & L. Dig., 20878. The act of April 16, 1845, P. & L. Dig. 1583, does not per-

mit the entry of judgment by judgment creditors to affect the lien of the mortgage Moreover, the act of Mar. 22, 1887, P. & L. Dig. 1585, prevents the lien of a prior mortgage from being discharged by any judicial sale. The other acts of assembly pertaining to mortgages are merely declaratory of the existing law. Justice Read in Commonwalth vs. Wilson 34 Pa. 63 clearly stated the true rule in regard to these acts. It being thus seen to be for the advantage of the plaintiff that his mortgage should be kept on foot, we must therefore presume that he intended it to be so.

We hereby direct that judgment be given in favor of the plaintiff for the amount of his lien out of the proceeds undergoing distribution.

Judgment for plaintiff.

OPINION OF THE SUPREME COURT.

On Bollinger's land, were three liens, viz. (1) A's mortgage; (2) B's judgment; (3) C's judgment. Subsequently the equity of redemption is conveyed by Bollinger to the mortgagee, A. Subsequently, judgment is obtained in a sci. fa. upon the mortgage, an execution is issued, and at the sheriff's sale thereon, the proceeds, now undergoing distribution are realized. The dispute between A, on one hand, and B and C on the other, is whether A as mortgagee shall be paid from the money, in preference to B and C.

As between Bollinger and A, the judgment upon the sci. fa. is conclusive that the mortgage was a subsisting security. The estate of Bollinger has been sold. It must be regarded as sold, even as against the judgment creditors. They could not treat the sale as void, and sell it again. As to them, as well as to the mortgagee, the fund must represent the land.

If the purchase by A of the equity of redemption, caused his mortgage to merge in the fee, the judgment became the first lien, and would be entitled to be paid. Ordinarily, a merger results from the union of the ownership of the mortgage and of the land, in the same person. It will not result however, if for any reason, it will be to his advantage that it shall not. If it has not been merged, A will now be paid. If it has merged, he will not. It is clearly beneficial to him, therefore that it is deemed not to have merged. Moore v. Harrisburg Bank, 8 W. 138.

It follows that the mortgage must be first paid. The residue of the proceeds will be applied to the judgments in the order of their ages.

Judgment affirmed.

HARPER'S ESTATE.

Ejectment—Wills—Fee Upon Conditional Limitation—Sheriff's Sale.

STATEMENT OF THE CASE.

Josiah Harper by will gave to his wife. her heirs and assigns "his dwelling house." He added "but should it not be necessary to sell this house in order to secure a support for my wife, my desire is that it go to my brother Henry and his heirs." The wife survived for six years and borrowed $2000 upon a mortgage on the house, which money she used in her own support. After her death the mortgagor foreclosed the mortgage and caused a sheriff's

sale. This is Ejectment between the purchaser and Henry Harper.

Barner for the plaintiff.

A devise of a fee when followed by a condition even to the extent of prohibition against disposing it, the conditions are void. Boyle v. Boyle, 152 Pa. 108; Kaufman v. Burgert, 195 Pa. 274.

The power to sell, no matter how that power is obtained, implies a power to mortgage. Duval's Appeal, 38 Pa. 118; Zane v. Kennedy, 73 Pa. 192.

McAlee for the defendant.

In a devise of this kind the presumption is always against conversion and when it is required it must be kept within the limits of actual necessity. Yerkes v. Yerkes, 200 Pa. 419.

OPINION OF THE COURT.

PARK, J.:—The words used by Josiah Harper in his will gave o his wife a fee in the property now in contention, but this fee was followed by a condition in another clause of the will. The first question which we will consider is whether or not this condition defeated or limited the fee. In Hardaker's estate 204 Pa. 181 the rule is laid down by the court that where an estate is given to a person with a power of disposition it carries with it a fee, this is expressed in clear and decisive words.

Now do the subsequent words "but should it not be necessary to sell this house in order to secure a support for my wife, my desire is that it go to my brother and his heirs", effect this fee? We think that it does not, and in support of this conclusion we quote from the opinion of the court in Re est. of Hugh Bellas 176 Pa. 122 where the court said "Where simply a desire is expressed subsequent to the devise it is inoperative." In view of these cases and the law as laid down in Lininger's Appeal 110 Pa. 398, and Cox vs. Rogers 77 Pa. 160 we conclude that the widow of Josiah Harper took a fee by the will, and that this fee was not effected by the subsequent desire. If she had a fee she certainly had an unrestricted right to sell. The will gave her the right to sell for her support. She did not sell but mortgaged the property for her support, Now can the mortgagee foreclose and does the purchaser at the sheriff's sale take a good title? A mortgage is a conditional sale.—Lancaster v. Dolan 1 Rawle 248. There can be no doubt but that if she had a fee, which we think she did, she then had the power of sale, and as it has been held in Zane v. Kennedy 73 Pa. 192 and Duval's Appeal 38 Pa. 118 that an absolute and unrestricted power to sell, includes a power to mortgage we conclude that the widow took a fee, that this fee was not effected by the subsequent limitations, and that she had the right to mortgage for her support.

Judgment is therefore given for the plaintiff.

OPINION OF THE SUPREME COURT.

If the gift of the house to the testator's widow was an unqualified fee, she of course could mortgage it, and the sale upon the mortgage would pass the ownership in fee over to the purchaser. He should then recover in the ejectment.

If the gift was of a fee, with the condition that, if the house should not necessarily be expended, in securing a support for the widow, then it should pass on her death to Henry Harper, i. e. if the gift to the widow was of a fee followed by conditional limitation; the purchaser at the mortgage sale should again, recover. We take it that the widow was to decide on the necessity of a sale, in order to secure a support. She in making the mortgage, has expressed the decision that she needed $2000 for her support. The mortgage was a form of sale, in order to raise this sum. The condition, therefore, on

which the limitation over to Henry was dependent, has not been realized. The fee has passed to the purchaser.

If we regarded the phrase concerning sale, etc., as showing that only a life estate was given to the widow, *plus* a power, if necessary to sell that estate and the remainder, the power to sell would include the power to mortgage, the mortgage would bind the remainder. the remainder would have become, by the mortgage-sale, the property of the purchaser.

From whatever point of view we regard the transaction, the plaintiff is entitled to the land. Henry Harper has nothing in it. There is nothing in Dickinson's Estate, 209 Pa. 59 inconsistent with this conclusion.

Judgment affirmed.

J. THOMPSON VS. BOROUGH OF CARLISLE.

Adverse Possession—Adverse User—Dedication.

STATEMENT OF THE CASE.

Thompson owned a lot facing on A street. He erected on it a house, setting the front 4 feet back of the building line. Over this space, he projected from the house a bay window, which did descend within 4 feet of the ground. After 30 years, during which the public used the 4 feet as the rest of the sidewalk, the Borough widened the street so as to make it embrace these 4 feet. This is an action of trespass to recover damages from the Borough for taking these 4 feet.

Hicks for the plaintiff.

Where a landowner sets back the fence along a public highway and leaves an open space for his own convenience, it is not a dedication to the public, although the space is used by the public jointly with the owner and with his sufferance. Griffin's Appeal, 109 Pa. 150; Weiss v. So. Bethlehem Boro. 136 Pa. 294.

Paved spaces left open on private property, for the accomodation of the owner and used by the public as passageways, are not thereby dedicated to the public use, but may be closed at pleasure. Gowen v. Phila. Exchange C. 5 W. & S. 141, Bush v. Johnson, 23 Pa. 209.

Sorber for the defendant.

The use of ground by the public as a highway for over 21 years makes it a public road as effectively as though it was originally laid out and opened by the proper authorities. Com. v. Cole, 26 Pa. 127; Donohue v. Lister, 205 Pa. 464.

OPINION OF THE COURT.

BRADDOCK, J.:—In this case the Borough sets up the user by the public of a four foot strip of ground in front of plaintiff's bay window and in front of his house for a period of 30 years alleging that this user establishes it as a public way. Permission to the public to use the way without intention to yield the right to use it, even continued for 21 years or more does not alone make a dedication. Griffin's Appeal, 109 Pa. 150; Weiss v. So. Bethlehem Borough, 136 Pa. 294.

A space left open in private property bordering on a highway for the accommodation of the owner and not of the public, may be resumed at pleasure. Gowen vs. Philadelphia Exchange Co., 5 W. & S. 141.

The mere setting back of a building from the line of a street is not a dedication of the intervening space to public use. Neill v. Gallagher, 31 Legal Int. 388.

In view of the foregoing cases the Court is of the opinion that the retiring of the front of the building, except the bay window, four feet from the pavement, coupled with the fact that as the plaintiff desired a bay-window over 28 inches deep he was compelled to set the house back from the street line, (Pages 53 Borough Ordinances of Carlisle, Section 6, 1853) is not evidence of an intention to dedicate to the public.

The Borough can not force him back and then take his land because he obeyed.

Judgment for plaintiff, for the amount the viewers awarded.

OPINION OF THE SUPREME COURT.

The house of Thompson was set back 4 feet from the building line. This was probably in part done in order that a bay window might be projected without trenching upon the sidewalk. A bay window was in fact built, and descended to within four feet of the ground. On these facts, there is no indication of a dedication to the public of the 4 feet wide strip between the facade of the house and the inner line of the sidewalk. Thompson had a purpose of his own to subserve which fully explains his acts. He will not under such circumstances, be supposed to have intended to give and to have given the strip away. Griffin's Appeal, 109 Pa. 150; Gowen v. Phila. Exchange Co., 5 W. & S. 141; Neill v. Gallagher 31, L. Int. 388; Weiss v. Borough of South Bethlehem, 136 Pa. 294. The mere fact that 30 years have elapsed since this setting back of the house occurred, will not convert it into a dedication. If a gift to the public was not then intended, such intention cannot be inferred because time has fled since the acts were done.

During these 30 years, the public has been using the strip of four feet, as the rest of the side-walk. They have walked within, as well as without it. But how, from this tolerated use, can an inference of dedication be made? That use was entirely consistent with the use to which he intended to put. and actually put, the land. To have quarrelled with every pedestrian, man, woman or child, that did not keep strictly without the official building line, would have been preposterous.

As a dedication cannot be deduced from the acts of Thompson and the acts of the public tolerated by him, neither can it be said that the public have acquired a right to the 4 feet wide strip, by adverse user. When the toleration of this use is explicable by other motives than the opinion of feeling that the public had a right to make it and when this use on the part of the public is explicable by other reasons than the belief of the people who used the strip, that they had a right to use it. Whether THompson willed it or not, it is impossible to affirm that a right has been acquired by the public. The case is unlike Donohugh v. Lister, 205 Pa. 464.

It follows that, when the borough widened the street by incorporating into it a strip of 4 feet along the side, it was under a duty to compensate the land owners, including Thompson.

Judgment Affirmed.

JOHN JONES VS. WM. SMITH.

Mutual Accounts—Statute of Limitations—Merchants' Accounts.

STATEMENT OF THE CASE.

John Jones is a dealer in farming implements. Wm. Smith is carrying on the business of farming. They enter into an agreement, namely: John Jones is to furnish implements, etc., to Wm. Smith, and he in return is to furnish plaintiff with hay, corn, oats, etc., and whenever an accounting is demanded by either one, each is to furnish an account and pay any balance thus shown to be due the other. Six years have passed since the date of the last item on the book of John Jones, but only five years have passed since Jones first demanded the rendering of an account.

This is assumpsit by Jones for $500.00.

Ehler for the plaintiff.

Where defendant, a farmer and shoemaker furnished hides, bark and grain to the plaintiff a tanner who furnished leather to the defendant they were held merchants' account within the exception to the Act of Mar. 27, 1713. Chambers v. Marks, 25 Pa. 296.

The statute makes an exception in these cases and provides no time within which the action must be brought. The courts hold that in merchants' accounts the statute runs only from the time of an account stated. Bevan vs. Cullen, 7 Pa. 281; Hamilton v. Hamilton, 18 Pa. 20.

Tyler for the defendant.

When there are mutual, current and unsettled dealings and accounts between the parties the items of credit and charge in such accounts, within six years before the commencement of the action are deemed equivalent to a subsequent promise reviving the debt. Thomas v. Hoffer, 1 W. & S. 467; Chambers v. Marks, 25 Pa. 296.

OPINION OF THE COURT.

RENO, J.:—The point raised by the statement of the case has involved us in an investigation of the language and construction of the Act of March 27, 1713 known more familiarly as the Statute of Limitations. The portion relevant to this case provides that, "All actions upon account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and agents" shall be commenced or sued within six years after the cause of action or suit accrues and not after. 1 M. L. 76 Sec. 1., P. & L. Dig. 2667. The language of the English statute upon the same subject is identical, but the Pennsylvania Courts have departed so widely from the English construction that nothing can be gained by a consideration of the transatlantic authorities. Not entirely satisfied with the statute, our Courts have apparently judicially legislated and engrafted new provisions upon the product of the General Assembly. Thus, due to some extent to the action of the Courts, we are permitted to speak of "mutual" and "merchants" accounts. The latter are indeed recognized by the Act, thought it failed to recognize or prescribe any limitation for actions on them. Hence the courts invented one, and now an action is barred even on a merchant's accounts, properly called, six years after an account is "stated" as distinguished from "open"; Bevan v. Cullen, 7 Pa. 281; or at least after a demand there-

for is made. Jane v. Mickey, 55 Pa. 310. Mutual accounts are nowhere mentioned in the Act, and although they are said to be exceptions resting within the statute, this seems doubtful. In mutual accounts, the remedy is barred six years after the date of the last item, irrespective of whether that item appears on the books of the plaintiff or defendant. Thomas v. Hopper 10 W. & S. 467; Chambers v. Marks 25 Pa. 296. The distinction between the two species of accounts then, is: The remedy on a merchants's account is barred six years after a demand for an account stated, while a mutual account will not sustain an action if the last item is beyond the six year period.

In the case at bar, six years have passed since the last item. Therefore, if it be a mutual account the action is barred. But only five years have passed since there was a demand for an account stated. If it is a merchant's account, then there is still an enforceable right of action.

We are convinced that this is not a merchant's account. One is a vendor of farming implements—the other is a farmer. The plaintiff will pass as a merchant , but neither reason nor authority dictate that a farmer is such. The law has always acknowledged a distinction between the trading and the agricultural class and it would be too late now to attempt to give the one the privileges belonging to another, especially on the ground that both are one. Neither is the account between the merchant and his factor or his agents. Hence the provision will not apply and the account is mutual. Having arrived at this conclusion it is but a step to decide that as the last item is of a date beyond six years ago, the remedy is barred and we must enter.

Judgment for the defendant.

OPINION OF THE SUPREME COURT.

The opinion of the learned court below ignores one of the important facts established by the evidence. The parties at the beginning of their reciprocal dealings, made an agreement each to furnish the other, from time to time, articles within his line, and postponing payment for these articles until either should express his desire to terminate the reciprocal dealings by demanding an account. The sum then to be paid was not the sum of the prices furnished by either to the other, but the difference between the sum of the prices of goods furnished by the plaintiff, and the sum of the prices of goods furnished by the defendant. The parties had a right to make such an agreement, and the courts must respect it.

The statute of limitations begins to run, when a right of action begins. Neither of the parties was in default, neither had a right of action against the other, until he demanded of, or presented to the other an account and demanded the difference. A bank which receives deposits, instantly becomes a debtor to the depositor, but it is bound to pay only on demand,and the statutory period of six years begins only with the demand. That period begins with respect to a check marked "good" only with its presentment to the bank for payment. A subscription to stock in a corporation payable on demand or call, becomes payable only on call, and the suit on it would be barred only after the lapse of six years from the call.

It is not necessary to hold that the demand for an account in the case before us, might have been indefinitely postponed with the effect of preventing the operation of the limitation. Doubtless, on the cessation of dealings for a considerable interval, the party deeming himself the creditor or desiring to ascertain whether he was or not, should have demanded a settlement. The verdict shows that not more than one year intervened between the last

credit on either side, and the demand by Jones for an account. In view of the fact that there were, in the dealings of these parties,frequently intervals of several months' duration, we cannot say that the delay of one year before demanding an account and payment was too great.

The verdict finds that "six years have passed since the date of the last item on the book of John Jones", but it does not find that there was no later item of credit on the side of William Smith. The time for demanding an account must be ascertained by reference to the last item on either side, furnished by the party in pursuance of the initial contract.

Our conclusion may be thus expressed. The parties agreed to furnish each to the other, an indefinite number of articles, at intervals within an in definite period of time. They agreed that the prices of these articles should be payable not upon delivery nor at all; but that, on demand, at any time, a balance should be struck, and the party found indebted should pay that *balance*. The obligation assumed was to pay that balance, and that obligation matured, so that an action could be maintained upon it, not before a demand for an account was made, or, should have been made. Probably this qualification should be eliminated, for the defendant might at any time have made the demand, had he thought the plaintiff too tardy, or had he intended to terminate the contract for continuous and recriprocal sales.

Judgment reversed with *v. f. d. n.*

JOHN TURNER vs. WM. PAUL.

Slander—Words Actionable per se—Measure of Damages.

STATEMENT OF THE CASE.

The uncle of Turner, who was disposed to bequeath $10,000 to him, and for the persuasion of Paul would have done so, was dissuaded by Paul from doing so, or making a will at all. The result was that Turner got only $2000 out of the estate. Paul was not pecuniarly benefited by the intestacy of the deceased but having a grudge against Turner, for that reason poisoned the decedent's mind by falsely accusing Turner of being a gambler and drunkard and consorting with base females. This is trespass for $8000.

Stuart for the plaintiff.

Any words which tend to injure the reputation of plaintiff are cause for action. Vanderlip v. Roe, 23 Pa. 82; Thompson v. Lush, 2 Watts 20; Hays v. Brierly, 4 Watts 393; Stoke v. Miller, 8 Sadler (Pa.) 100; Wilton v. Singleton 7 S. & R. 449.

The showing of malice on the part of the slanderer is sufficient to justify the imposition of punitive damages. Gray v. Pentland, 2 S. & R. 23: Bruce v. Reed, 104 Pa. 408.

Sorber for the defendant.

In case of slander the damages recoverable must be the natural, direct, proximate and necessary result of the defamatory words. Place v. Shippen, 80 Pa. 513; Wallace v. Rodgers, 156 Pa. 395.

OPINION OF THE COURT.

CAREY, J.:—The facts of the case are briefly, as follows: Turner's uncle was dissuaded from leaving him $10,000 by Paul, who to satisfy a grudge told the uncle, Turner was "a gambler, a drunkard, and a consorter with base women." This was false, but as a result the uncle left Turner only $2000. Turner now sues for the difference viz. $8000.

The questions are (1) Are the words gambler, drunkard, and consort with base women, actionable, per se (2) What is the measure of damages in this case.

The cases hold that the word "Drunkard" is not actionable per se.unless it is coupled with some business in which drunkeness is a disqualification 39 Fed. Rep. 672; A. & E. Enyc. Vol. 13 p 377.

Whenever the statute makes an offence punishable by fine or imprisonment it is actionable per se. As to gambling, the statute holds a "common gambler" to be person who engages for a living in gambling, or one who having no fixed place of residence is in the habit of gambling for a living. It is true that Paul did not say Turner was a "common" gambler, which is the term used in the statute, yet we think that by innendo he is guilty of accusing Turner of an actionable offense. As words calcuated to induce the hearer to believe that the person of whom they are spoken is guilty of a crime is sufficient.

The words "consorter with base females" we take to impute the crime, by innuendo, of fornication, and as such they are actionable per se. 54 Conn. 4 26; 2 Conn. 707; 66 Barb. (N. Y.) 429; 2 Phila. 210.

Spoken words imputing a crime punishable with imprisonment are actionable without special damage being shown. We therefore hold that Turner can recover, but the amount is a question for the jury. Turner had no vested right in his uncle's estate. His uncle might lose his money before death. He could certainly leave it to whom he pleased. Turner himself might not live to inherit. Certainly he had no more than a mere expectancy. If his reputation or business is injured to the extent of $8000 then this amount should be awarded. Not because it is the difference between the amount received and the amount expected, but because he is injured to that extent. If he is not injured in reputation or business to this extent then a less amount should be awarded, which amount we leave for the jury to determine.

OPINION OF THE SUPREME COURT.

The action is for the loss occasioned by false words spoken to his uncle about Turner. He was accused by Paul, of being a gambler, drukard and consorter with base females. The accusation was known by Paul to be false. It was made in order to dissuade the uncle from bequeathing, (as he intended to do, and *would* have done,) $10,000 to Turner. The bequest was in consequence, not made, and the result was that instead of getting $10,000 from his uncle's estate, Turner got, by the intestate law, but $2000.

The learned court below has discussed whether the charges imputed crime, and for that reason, were actionable per se. It is not a crime to be a drunkard, nor to be a gambler, nor to consort with base women. Other facts must be conjoined with these, in order to constitute a crime. But we think the question irrelevant. The words were spoken in order to effect a definite result, viz., the disherison, (or its equivalent) of Turner. The result was effected. We think the defendant for this reason is bound to indemnify the plaintiff.

Turner, it is true, had no *right* to the bequest of $10,000. He did not have a right to the abstinence by Paul, from false representations, in order to dissuade the deceased uncle from making it. A man has no *right* to inherit from his father, but a defamation which produces disherison is an actionable slander, 1 Jaggard, Torts, 509. A merchant has no right that X, or Y, or Z, shall deal with him, but he has a right that they shall not be induced to refuse their trade, by false declarations of any one. If B by falsehood prevents A's being invited to a friend's house for dinner, his words are actionable; 1 Jaggard, Torts, 489; Lynch v. Knight, 9 Fl. L. Cas. 599; Davies v. Salomon, L. R. 72. B. 112. A, employed by B, but for no definite time, and therefore dismissible at any time, has no *right* to be continued in the employment, but he has a right that his dismissal shall not be produced by false accusations of the defendant. *Cf.* Wallace v. Rodgers, 156 Pa. 395. If A *will* perform a contract with B which, because of the statute of frauds, he is not bound to perform, and C, by falsehood, induces him to repudiate it, B. will have indemnification from C. Though he had no legal right that A should perform, he had a right that A should not be dissuaded from performing by C's false words.

It sufficiently appears that the direct result of the defendant's words, was the loss by plaintiff of $8000. This loss was in the contemplation of Paul. It was intended, because of a grudge. He is guilty of a malicious and purposed diversion of $8000 from Turner. He should therefore make the latter whole. The case differs essentially from Marshall v. DeHaven, 203 Pa. 187.

Judgment reversed.

WM. J. JOLLINGS vs. AARON STEVENS.

Contingent Fees—Subornation of Perjury.

STATEMENT OF THE CASE.

Stevens employed Jollings, attorney, to recover for him, a tract of land worth $3,000 offering Jollings ⅓ of its estimated value, $3,000, if he succeeded. Jollings was to disover the grounds of recovery and find the evidence. It was not understood that any perjured evidence was to be obtained. Jollings finding that the only way to recover would be to prove that Stevens's grantor was the heir of John Kilpatrick, employed four witnesses to perjure themselves in swearing that the grantor was the only son of John Kilpatrick, and that John Kilpatrick was dead. The grantor, though named Kilpatrick was not the son, neither was John Kilpatrick dead. The verdict and judgment in favor of Stevens, however were conclusive.

This is an action for the fees agreed upon.

Robertson for the plaintiff.

The law will not allow the principal to repudiate the fraud of his agents and at the same time retain the fruits. Hughes v. Bank, 110 Pa. 128; Wheel-

er & Wilson M'f'g Co. v. Aughley, 144 Pa. 398; Reynolds v. Fenton, 2 Phila. 222.

Gardner for the defendant.

The principal is not liable for an act of his agent on the agent's own behalf. Smith v. Ins. Co. 24 Pa. 320: Stewart v. Bremer 63 Pa. 268.

OPINION OF THE COURT.

BOWMAN, J.:—From a perusal of the opinions of the Supreme Court in the cases cited below, it appears that it has long been held that contingent fees are not illegal in Pennsylvania. The last case cited would in itself be sufficient to convince the court that this doctrine is fully established: Miles v. O'Hara, 1 S. & R., 32; Boulden v. Hebel, 17 S. & R., 312; Strohecker v. Hoffman, 7 Harris, 223; Chester Co. v. Barber, 1 Out., 463; Dickerson v. Pyle, 4 Phila, 259; Perry v. Dicken, 105 Pa., 83; Beatty v. Larzelere, 194 Pa., 605: Williams v. Philadelphia, 208 Pa., 282.

The defendant refuses to pay to plaintiff the fee agreed upon in the contract.

It appears from the statement of facts that there was nothing illegal in the contract; "that it was not understood that any perjured evidence was to be obtained." The plaintiff, however, found that the only way to recover the land and receive his fee would be to prove that Stevens's grantor was the heir of John Kilpatrick. He employed four witnesses to perjure themselves in order to obtain a verdict. He obtained a verdict and judgment for his client, Stevens.

Can it be said, as counsel for defendant urges, that the procuring of these perjured witnesses invalidates the contract between the plaintiff and defendant, and relieves the defendant from paying the amount of this contingent fee? We think it can not. In Perry v. Dicken, *supra*, the court said, "If it appears that the contingent fee is a reward for his services as a witness, this contention," that the atorney cannot recover, "would certainly be sustained; such a contract would be not only reprehensible but highly immoral, against public policy, and therefore, illegal and void." But in our case it does not appear that the fee was to be a reward for his services as a witness, nor does it appear that the fee was to be a reward for his services in procuring perjured witnesses. The statement of facts shows the contrary: that it was a reward for a conclusive verdict and judgment.

We think that the contract for the fee is valid and binding; that what the attorney did in executing his part of the contract, however immoral and illegal, does not bar his right to recover the amount of his fee.

Notwithstanding our abhorrence of such practice as the plaintiff has used in this case,—in obtaining these witnesses, we are constrained in deference to the consideration before mentioned to render judgment in his favor.

Judgment affirmed.

KELKER vs. GIMFORT.

Malicious Prosecution—Want of Probable Cause—Malice.

STATEMENT OF THE CASE.

Gimfort, thinking Kelker had stolen his watch, on information of a roommate of Kelker, had him prosecuted and tried and convicted. The court granted a new trial and finally the Commonwealth entered a nolle prosequi. Gimfort's watch had in fact been stolen, but he had found it again. He had had a quarrel with Kelker and welcomed the accusation as a means of punishing him. This is an action for malicious prosecution.

Hassert for the plaintiff.

Henneke for the defendant.

The burden of proof lies on the plaintiff to show malice and want of probable cause. If probable cause is shown it matters not whether the motive of the prosecutor was praiseworthy or malicious. Beihofer v Loeffert. 159 Pa. 374; Leahey v. March, 155 Pa. 458; Scott v. Dewey, 23 Super. 396.

OPINION OF THE COURT.

WOLFE, J.:—This action of malicious prosecution was brought by Kelker against Gimfort because Gimfort had prosecuted Kelker on the criminal charge of larceny based on the information of the roommate of Kelker. Malicious prosecution cannot be brought and sustained unless there are present these elements: a termination of the prosecution; want of probable cause; and malice. In the case at bar Kelker had been found guilty of the larceny of the watch but a new trial was granted and not given because the Commonwealth had entered a nolle prosequi. That this was sufficient termination, is not doubted so we pass to the second element namely that of want of probable cause.

The facts are undisputed so it is the duty of the court to direct the jury to find a verdict. "The question of direct cause is one of law for the court where the facts relied on to constitute it are admitted or established beyond controversy."

Huckstein vs. N. Y. Life Insurance Co. 205 Pa. 27. Previous to the indictment for the larceny of the watch Gimfort and Kelker had quarrelled and the former welcomed the accusation as a means of displaying his vindictiveness. This expose of unchristian feeling on the part of Gimfort seemed to Kelker unwarrantable, unpardonable and illegal so he institutes this civil action.

If the facts show want of probable cause Gimfort has over-leaped himself and has leaped from the proverbial frying pan into the fire, and Kelker can be doubly gleeful over this second humiliation of Gimfort. On Kelker lies the burden of proving the want of probable cause.

Scott vs. Dersey 23 Super. 396.

A crime, a felony has been committed here. The roommate of Kelker informed the loser of the watch that Kelker was the thief. On the trial enough evidence was produced by the Commonwealth to sustain a verdict of guilty on the indictment of larceny. If a verdict of not guilty had been rendered, we would have been constrained to doubt very seriously whether

the information obtained from the roommate of the accused was such as to induce an ordinary prudent man in believing Kelker guilty, and particularly so in memory of the fact of the previous altercation between the parties to this action. But twelve men were convinced of the reliability of the information, likewise the court, so we think that this information was sufficient to sustain the prosecution. Moreover, there has not been shown on the part of the plaintiff that the roommate was in collusion with Gimfort, or even a friend. Such testimony absent, the very reasonable inference is drawn that at most the roommate was a disinterested person if not in fact a friend of the accused. Roommates usually are congenial and friendly toward each other, and seldom desirous of inflicting punishment on each other either directly or indirectly. Nothing was shown by the plaintiff that would cause the defendant to have discredited the room-mate's communication because of the source.

The plaintiff urges upon us the malice borne towards him by the defendant because of their quarrel. Even if that prompted the defendant to prosecute on the charge of larceny, the existence of malice at that time is strongly rebutted by the entering of the nolle prosequi before the second trial. Larceny is a felony and not within that class of cases that can be withdrawn before running the course of trial. It is not an exception within the Act of Mar. 13, 1860, P. & L. 1410-1411. There might not have been a second conviction but Gimfort if he were so very vindictive could harass the plaintiff by imposing on him the necessity of undergoing a second trial, and the concurring expense, even though the watch had been found, as its reception by the owner was no satisfaction of the public wrong committed. If that were the case most crimes could be atoned for to the destruction of society. In the absence of this apparent good-will on Gimfort's part in not insisting on the second trial, and in the presence of express malice on his part Kelker could not urge this malice as a means of showing probable cause.

"Absence of probable cause is essential; from want of probable cause, malice may be inferred; but from malice, even if express, want of probable cause cannot be inferred."

Cloon vs. Gerry 13 Gray (Mass.) 201.

The former conviction of the plaintiff strengthens the opinion that Gimfort had facts within his knowledge sufficient to sway an ordinary, prudent man to the belief that Kelker was the miscreant who stole the watch.

"It is generally agreed that a conviction of a defendant in a criminal proceeding, though subsequently reversed, negatives the absence of probable cause, unless it is made to appear that the conviction was procured by the fraud of the instigator of the criminal proceeding."

Ames Cases on Torts p. 551, Vol. 1 (note).

It seems that the same principle applies in Pennsylvania.

"In an action for maliciously suing out a capias ad respondendum, the plaintiff is estopped from denying the existence of a probable cause of action by the fact that a judgment was rendered against him in the suit in which he was arrested."

Herman vs. Brookerhoff 8 Watts 240.

While we might have applied this principle in the case at bar, we have chosen to base our opinion upon other grounds. The able and exhaustive and very satisfactory brief of the learned counsel for the defendant has aided us very considerably in reaching our conclusion. The opinion of the court is that the prosecution upon which this action is based is founded upon prob-

able cause as shown by the undisputed facts of the case therefore we direct the jury to render a verdict for the defendant.

"If the admitted facts amount to probable cause, the court should direct a verdict for the defendant."

Bruff vs. Kendrick 21 Super. 469.

Judgment accordingly.

OPINION OF THE SUPERIOR COURT.

The watch had in fact been stolen. That it was subsequently recovered, did not obliterate the theft. A roommate of Kelker informed Gimfort that Kelker had committed the theft. Nothing is suggested that would indicate that Gimfort ought to have disbelieved the roommate. We see no error therefore in the decision by the court below that Gimfort had probable cause for believing Kelker guilty. The evidence persuaded the jury that found Kelker guilty, hence Gimfort had probable cause for making the information.

The motive which inspired him to make the information was composite. That which inspires most informations is such. If a man has suffered from an assault or a theft, etc., he is seldom actuated purely by a humanitarian desire to repress crime generally, when he makes the information. Some element of grudge or vindictiveness usually accompanies the more elevated feeling. Gimfort having quarreled with Kelker, was rather glad, having recovered his watch, that Kelker had given him an opportunity to cause him trouble. There was then, a tinge of malice in his mind. However, malice alone will not support the action. Along with it there must be a want of probable cause. Lipokicz v. Jervis, 209 Pa. 315; Beihofer v. Loeffert, 159 Pa. 365.

Although then Kelker was innocent, or, at least, as the action of the court in setting aside the verdict of guilty, and that of the district attorney, in entering a *nolle prosequi*, showed he could not be proven guilty, and although Gimfort was moved somewhat by a malicious feeling in instituting the prosecution, since he was not shown to have been without probable cause. the court below properly refused to allow Kelker to obtain a verdict.

BOOK REVIEW

The Law of the Domestic Relations. By James Schouler; Little, Brown & Co.

Like the work just referred to this is an abridgement of an earlier work by the same author. Its purpose is, to use words of the writer, "to supply students and the professional lawyer alike with an elementary treatise which may serve for study and practical use." The larger work has long held a distinguished place in the legal literature of the country. A somewhat careful examination of this smaller book convinces us that it will be extremely useful as a text book for students of law, and as a repertory of general principles, with appropriate citations of authorities, helpful to the practitioner. The chapter on the wife's separate property, is very interesting and able. No less useful are the chapters on marriage, the wife's debts and contracts, her dominion over her separate property and her power to trade. Dealing admirably with a subject of supreme and perennial importance, the work is worthy of the highest praise.

The following will be reviewed in the November number:

The Law of Crimes. By John Wilder May, Little, Brown & Co.

The Law of Bailments. By James Schouler; Little, Brown & Co.